

SCOTT J. ROSS,

Claimant,

V.

CIRCLE A CONSTRUCTION,

Employer,

and

EVEREST NATIONAL
INSURANCE COMPANY,

Surety,
Defendants.

IC 2001-020219

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

FILED SEP 5 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls on April 1, 2008. Darin G. Monroe represented Claimant. David P. Gardner represented Defendants. The parties presented oral and documentary evidence. The record was held open for the potential receipt of physicians' post-hearing depositions. The parties did not take these depositions. They submitted briefs. The case came under advisement on July 16, 2008. It is now ready for decision.

ISSUES

According to the Notice of Hearing, the issues were presented as follows:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident; and
2. Whether and to what extent Claimant is entitled to benefits for:
 - a) Permanent partial impairment (PPI),
 - c) Permanent disability,
 - d) Medical care, and
 - e) Attorney fees.

RECOMMENDATION - 1

CONTENTIONS OF THE PARTIES

The parties agree Claimant was injured in a compensable accident which included a skull fracture, traumatic brain injury, fractured ribs, and other injuries.

Claimant contends his rib fractures resulted in continuing nerve pain. He is entitled to continuing medical care for pain management of this condition, specifically cryoablation treatment of the nerves around his ribs. Treatments may occur annually or biennially as needed. Defendants are liable for attorney fees for unreasonable denial of benefits related to Claimant's pain management. He is also entitled to a PPI rating for his rib fractures and a permanent disability rating for his loss of access to the labor market.

Defendants contend Claimant's request for additional cryoablation of the nerves around his ribs is unreasonable. Claimant was awarded 10% whole person PPI for his head injuries and has not shown he is entitled to any additional PPI or permanent disability. He returned to work with Employer at the same wage and has received raises since. Defendants acted reasonably at all times, and attorney fees under §804 are not appropriate.

EVIDENCE CONSIDERED

The record in the instant case consists of:

1. Oral testimony at hearing of Claimant and Claimant's father who was also Claimant's supervisor;
2. Claimant's Exhibits 1 – 6; and
3. Defendants' Exhibits 1 – 18.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

RECOMMENDATION - 2

FINDINGS OF FACT

1. Claimant worked for Employer. He fell about 25 feet from a ladder onto a concrete floor on June 4, 2001.

2. Claimant received treatment for his extensive injuries. He returned to work after about three months of temporary disability. Pain in his chest wall remained after rib fractures healed.

3. Only Claimant's recurring chest wall pain remains an issue for purposes of medical care benefits.

4. On November 12, 2003 Clinton L. Dillé, M.D., provided cryoablation of certain of Claimant's fifth, sixth, and seventh intercostal nerves on the right. This treatment, coupled with a trigger point injection, resolved his rib pain for a significant period of time.

5. Eventually, the chest wall pain returned. On December 2, 2004, a second cryoablation was performed. It was not effective. Dr. Dillé believed a more thorough cryoablation would resolve Claimant's pain.

6. On January 6, 2005, a repeat cryoablation was performed. This procedure failed to reduce Claimant's pain. Dr. Dillé believed use of a larger needle would resolve Claimant's pain.

7. Surety was reluctant to authorize additional cryoablation treatment after two failures. Claimant reasonably required prescription analgesics to reduce his chest wall pain.

8. On March 27, 2007, a repeat cryoablation was performed with a larger needle. Claimant's chest wall pain ameliorated.

9. As of the date of the hearing, Claimant's chest wall pain was returning.

RECOMMENDATION - 3

10. Dr. Dillé opined cryoablation may permanently resolve chest wall pain or may be required to ameliorate it every 12 to 24 months, depending upon how a patient's nerves respond to the treatment.

11. On September 15, 2003, treating physician Nancy Greenwald, M.D., opined Claimant was medically stable and suffered a 10% whole person PPI from the brain injury. She noted his chronic chest wall pain but found no additional PPI for any condition other than the brain injury. She restricted him from lifting over 75 pounds and working from unprotected heights.

12. On September 19, 2003, Craig W. Beaver, Ph.D., evaluated Claimant. He opined Claimant suffered a 10% whole person PPI as a result of the head trauma from the fall.

13. On August 29, 2005, Michael T. Phillips, M.D., evaluated Claimant. He opined, "[I]t is unlikely further cryoablation treatment would improve [Claimant's] functional capacity or reduce his physical impairment."

Vocational and Disability Factors

14. Claimant was born November 5, 1963. On the date of accident he was 37 years old.

15. He earned a high school diploma. He has no formal education after high school.

16. He has performed a variety of agricultural work. He has occasionally worked as a crew chief in agricultural endeavors. He has worked as a welder and as a machinist's assistant.

17. Claimant's time-of-injury wage was \$10.45 per hour. He has returned to work and, at the time of hearing, makes more than his time of injury wage.

18. Claimant suffers some neurocognitive difficulties from the head trauma. These are not immediately noticeable to others but continue to cause Claimant some frustration.

RECOMMENDATION - 4

19. Claimant is a pleasant and personable individual who could make a good first impression in a job interview. Claimant does not display significant disfigurement of a type that might impact his ability to obtain or keep a job.

Discussion and Further Findings

20. **Credibility.** At hearing, Claimant's demeanor was credible.

21. **Causation.** A claimant must prove his condition likely was caused by his work in order to be eligible for any benefits under the Idaho Workers' Compensation Law. Seamans v. Maaco Auto Painting, 128 Idaho 747, 918 P.2d 1192 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. Beardsley v. Idaho Forest Industries, 127 Idaho 404, 901 P.2d 511 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. ISIF, 126 Idaho 781, 890 P.2d 732 (1995).

22. Claimant established his continuing chest wall pain was caused by the accident. His nerves "reconnect" to send pain signals after previous effective cryoablation treatments.

23. **Medical Care.** An employer is required to provide reasonable medical care. Idaho Code § 72-432(1). Reasonable palliative care is within the requirements of the statute. Prado v. Appleton Produce Co., 2007 IIC 0649 (2007); Clark v. Idaho Truss, 2004 IIC 0761 (2004), aff'd 142 Idaho 404, 128 P.3d 941 (2006); Hamilton v. Boise Cascade Corp., 84 Idaho 209, 370 P.2d 191 (1962).

24. Here, Claimant's injuries have left him with a chronic pain condition. Dr. Phillips' opinion is accepted as accurate. However, although the treatments may not affect functional capacity or permanent impairment, they have shown to be effective in facilitating his efforts to go to work every day and to perform his work which requires

RECOMMENDATION - 5

substantial movements of his trunk during the course of a day. Dr. Dillé appears to have worked out the difficulties which resulted in the two failed treatments. They provide Claimant with significant subjective improvement in his pain such that he can reasonably be expected to perform any duty at work within his restriction. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989)(nonexclusive bases upon which reasonable medical care may be evaluated). Cryoablation is a reasonable alternative to other nerve ablation treatments.

25. Claimant is entitled to palliative medical care for his chest wall pain, including cryoablation treatments as often as once per year as needed.

26. **PPI.** “Permanent impairment” is defined by statute. Idaho Code §§ 72-422, -224. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

27. Claimant suffered an undisputed 10% whole person PPI as a result of the accident. He suffered no additional compensable PPI.

28. **Permanent disability.** Permanent disability and its evaluation are defined by statute. Idaho Code §§ 72-423, -425, -430.

29. Claimant went back to work after the accident. Considering all medical and nonmedical factors, including especially those factors addressed above, his disability is subsumed in the PPI rating. Claimant failed to show he is entitled to permanent disability in excess of PPI.

30. **Attorney fees.** Attorney fees shall be awarded where the Commission finds the conditions of Idaho Code § 72-804 are satisfied. *Bradley v. Washington Group International*, 141 Idaho 655, 115 P.3d 746 (2005).

RECOMMENDATION - 6

31. Claimant failed to show Surety acted unreasonably. The failed cryoablation treatments, together with Dr. Phillips' expert opinion provided a reasonable basis for denying additional cryoablation treatments, despite the findings of the Commission that Claimant is ultimately entitled to such treatments.

CONCLUSIONS OF LAW

1. Claimant suffered a 10% whole person PPI caused by the accident;
2. Claimant failed to show he suffered permanent disability in excess of PPI;
3. Claimant is entitled to medical care benefits for palliative care, including cryoablation treatments for his chronic chest wall pain up to once per year as needed; and
4. Claimant failed to show that attorney fees are awardable under Idaho Code § 72-804.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 28TH day of August, 2008.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SCOTT J. ROSS,)	
)	
Claimant,)	IC 2001-020219
v.)	
)	
CIRCLE A CONSTRUCTION,)	ORDER
)	
Employer,)	
and)	
)	
EVEREST NATIONAL)	
INSURANCE COMPANY,)	FILED SEP 5 2008
)	
Surety,)	
Defendants.)	
_____)	

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a 10% whole person PPI caused by the accident.
2. Claimant failed to show he suffered permanent disability in excess of PPI.
3. Claimant is entitled to medical care benefits for palliative care, including cryoablation treatments for his chronic chest wall pain up to once per year as needed.
4. Claimant failed to show that attorney fees are awardable under Idaho Code § 72-804.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 5TH day of SEPTEMBER, 2008.

INDUSTRIAL COMMISSION

/S/_____
James F. Kile, Chairman

/S/_____
R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5TH day of SEPTEMBER, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

Darin G. Monroe
P.O. Box 50313
Boise, ID 83705

David P. Gardner
P.O. Box 817
Pocatello, ID 83204-0817

db

/S/_____

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